No. 21,882

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

FALCON PLASTICS—DIVISION OF B-D LABORATORIES, INC.,

Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition to Set Aside Decision and Order of The National Labor Relations Board.

PETITIONER'S OPENING BRIEF.

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PETITIONER'S OPENING BRIEF.

Jurisdiction.

The National Labor Relations Board issued its Decision and Order dated May 19, 1967 [R. 64-71]* finding Petitioner, who transacts business within the jurisdiction of the Ninth Circuit [R. 20:17-27], guilty of an unfair labor practice in violation of Section 8(a)(1) of the National Labor Relations Act (29 U.S.C.A. §158 (a)(1). [R. 68.]

Accordingly, this Court has jurisdiction to review, modify or set aside the Board's Decision and Order upon petition by Petitioner, a person aggrieved thereby. (29 U.S.C.A. §160(f).) Such petition was filed June 1, 1967. [R. 73.]

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*"R" refers to Record [Vol. I, Transcript of Record]; "T" refers to Reporter's Transcript [Vol. II, Transcript of Record].

Statement of the Case.

1. The Proceedings.

The Complaint alleged that Petitioner engaged in seven distinct unfair labor practices:

a. Discharged Nhoon Reese because of his union or other concerted activity [R. 5, paras. 6, 7];

b. On two separate occasions promised or granted benefits to employees if they refrained from union or other concerted activity [R. 5, para. 8(a); R. 6, para. 8(e)];

c. On two separate occasions threatened reprisals to employees if they engaged in union or other concerted activity [R. para. 8(b)];

d. Coercively interrogated an employee about his union activity [R. 6, para. 8(c)];

e. Created the impression of having engaged in surveillance of employees' union or other concerted activities [R. 6, para. 8(d)].

At the hearing, the General Counsel amended the Complaint to include an additional allegation that Petitioner violated Section 8(a)(1) of the Act by granting a premium wage rate for the swing shift and the graveyard shift. [R. 28:35-37, 53:55; T. 392:21-393:25; 396:15-16.]

Following a hearing which lasted four days and encompassed 596 pages of transcript, the Trial Examiner, in a carefully considered 23-page, single-spaced decision, found that Petitioner had not engaged in any of the alleged unfair labor practices [R. 26:33-36; 30:5-17; 33:6-13; 41:22-28] and recommended that the Complaint be dismissed in its entirety. [R. 41:24-28.]

The General Counsel filed 129 exceptions to the Trial Examiner's Decision.

The Board, upon consideration of the Trial Examiner's Decision, the entire record, and the General Counsel's 129 exceptions, adopted *in toto* the findings, conclusions, and recommendations of the Trial Examiner [R. 64], with but a single reversal on one point alone. [R. 64.]

The Board agreed with the Trial Examiner's findings that Petitioner did not promise benefits to employees if they refrained from union or other concerted activities, that Petitioner did not threaten reprisals to employees if they engaged in union or other concerted activities, that Petitioner did not coercively interrogate employees, that Petitioner did not create the impression of having engaged in surveillance of employees' union or other concerted activities, that Petitioner did not grant a premium wage rate in order to interfere with, restrain or coerce employees, and that Petitioner did not discharge Nhoon Reese because of his union sympathies. [R. 64.]

The Board, however, reversed the Trial Examiner on one point; although the Board adopted the Trial Examiner's finding that Nhoon Reese was not discharged because of his union sympathies (and thus there was no 8(a)(3) violation), the Board found that Reese was discharged for engaging in protected concerted activity to secure increased wage benefits, and thus there was an 8(a)(1) violation. [R. 64, 68, 69.]

It is from the Board's reversal of the Trial Examiner on this one point that Petitioner seeks review, and respectfully asks this Court to set aside that portion of

the Board's decision and to deny enforcement of the Board's order.

2. The Facts.

Petitioner Falcon Plastics is a division of B-D Laboratories, Inc., which is wholly owned by Becton-Dickinson & Company, one of the oldest manufacturers of medical products in the United States. [T. 158:13-16.] Falcon Plastics makes medical products, primarily for use in the laboratory. [T. 155:14-18.]. The quality of products is extremely important [T. 158:24-160:6; 186:24-190:25] and the standards to which Petitioner manufactures are higher than Federal standards. [T. 159:2-13.]

As found by the Trial Examiner, Petitioner "stresses the need for high quality control, stricter than the requirements imposed by the Food and Drug Administration and other government agencies, not only from the standpoint of health and safety but also from that of its pride in reputation of its products. The parent company maintains Biological Safety and Quality Control Committees which audit Respondent [Petitioner] as to both aspects of this production and Respondent [Petitioner] itself maintains detailed quality production control records." [R. 21:44-51.]

Because the quality of Petitioner's medical products is so critical, Petitioner places extreme importance upon the attitude of its employees, particularly toward supervisors. [T. 159:6-160:16.] As expressly quoted by the Trial Examiner, Petitioner's personnal manual pro-

vides penalties ranging from reprimand to immediate discharge for various rule violations, including insubordination and poor attitude. [R. 39:38-40:13; see also, T. 410:4-412:21; 418:16-419:7.]

The personnel manual also provides that the degree of penalty for a violation depends on "the seriousness of the offense in the judgment of management." [R. 39:47-48.]

On March 30, 1966, Byrd, Nhoon Reese's foreman [R. 23:2], told Reese that Reese was to receive a 10¢ per hour merit increase; Reese told Byrd that Petitioner could "shove it up their butt" or "stick it up their ass." [R. 33:43-35:10.] Reese was discharged on April 4, 1966. [R. 35:16-36:12.]

All testimony, including Reese's own, is an agreement that when he was offered the merit increase he told foreman Byrd that Petitioner could "shove it up their butt" or "stick it up their ass." [Reese, T. 86: 8-10; 89: 9-12; 576:21-23; Horn, T. 279:20-280:11; Farkas, T. 378:2-7; Lux, T. 435:21-436:2; 441:14-18; Byrd, T. 544:15-18.]

Bryd testified that he was mad enough to fire Reese on the spot, and didn't do so only because he wasn't sure that he had the authority. [T. 556:7-557:18; 559:1-14.] Management was unanimous that they considered Reese to be insubordinate and that this was the sole reason for Reese's discharge. [Horn, T. 292:23-293:21; 295:6-12; Farkas, T. 384:11-14; Lux, T. 450:24-451:3; 481:1-4; 502:22-506:2; Byrd T.

548:8-549:15.] As mentioned above, the penalty of discharge was consistent with the personnel manual, and the manual is given to all of Petitioner's employees. [T. 408:2-7.]

The Trial Examiner specifically found that "Reese's behavior and attitude toward Supervisor Byrd, and the language with which he underscored his disgruntlement about the proffered merit increase, undoubtedly provided cause for discharge." [R. 38:40-42.]

There was no manifestation by Petitioner of opposition to the union or to the self-organizational rights of the employees [R. 29:45-47], no anti-union animus, hostility, or other misconduct on the part of Petitioner [R. 29:53-30:3], and "there is a total absence of evidence of anti-union animus, hostility or opposition to the Union, or of the commission of unfair labor practices by Respondent [Petitioner]" [R. 40:33-35].

The Trial Examiner categorically rejected certain of the testimony of the alleged discriminatee, Nhoon Reese, and found that, judged by Reese's own testimony and his attitude and demeanor on the witness stand [R. 24:43-44], such testimony was "singularly unconvincing" [R. 24:45], imposed "a serious strain on one's credulity" [R. 26:10-14], was "so palpably contrived to furnish a basis for his claim of discriminatory treatment, as to be unworthy of belief" [R. 26: 26-29], and that "perhaps the most charitable thing to be said for Reese's testimony is that it was a case of 'the wish being mother to the thought' ". [R. 26:29-31.]

3. Questions Involved.

a. Can the Board, relying upon non-existent facts d drawing unsupported inferences, substitute its ıdings for those of the Trial Examiner that there ıs cause for Reese's discharge, and erroneously find at Reese's discharge was unlawful?

b. Can the Board, relying upon non-existent facts d drawing unsupported inferences, substitute its dgment for that of Petitioner that there was cause r Reese's discharge, and erroneously find that Reese's scharge was unlawful?

4. Specification of Errors.

Insofar as the Board's Decision and Order finds ıd concludes that Petitioner violated the National La- ır Relations Act, as amended, by discharging Nhoon eese, and orders Petitioner to take certain action as result thereof, it is contrary to law and to the Act, contrary to the evidence, and is not supported by ıbstantial evidence considering the record as a whole.

ARGUMENT.

1. The Board's Finding That Nhoon Reese Was Discriminatorily Discharged Is Contrary to the Evidence and Is Based Upon Unsupported Inferences Which the Board Has Created From Non-Existent Facts.

The Board agrees with Petitioner and the Trial Examiner at least to the extent that in some circumstances Reese's language "might be regarded as so offensive in character as not to be condoned" [R. 66], "but", says the Board, "the true character of such mode of expression must be evaluated not in the abstract but in the context of the surroundings in which it occurs." [R. 66.]

However, the "context" in which the Board then proceeds to "evaluate" Reese's conduct is plucked by the Board from blue-sky, for such "context" is not found in the facts of this case. The major reasons given by the Board for its erroneous reversal of the Trial Examiner simply do not square with the actuality of the record, and owe their existence solely to the imagination of the Board:

a. Board's erroneous statement: "In this case there is evidence that such language was commonly used by employees at this plant in their work-a-day associations." [R. 66.]

Actuality: There is no such evidence. The only testimony on the subject of common usage at the plant of such language is that of foreman Byrd, to whom Reese made his insubordinate statement, and Byrd's testimony is directly contrary to the Board's assertion. Byrd testified that the language

cannot be classed as shop talk and that he, Byrd, had not heard it used. [T. 551:24-552:7.]

b. Board's erroneous statement: "Further, Reese made the remark to a supervisor with whom a personal relationship existed." [R. 66.]

Actuality: At best, this statement by the Board is a misleading exaggeration of the testimony; at worst, it is without support in the testimony. The only testimony which even relates to this point is that of Byrd, who testified that he had gone fishing with Reese twice, and that Reese did not use words such as "ass" on these fishing trips. [T. 551:11-552:1.] The record contains no description of these fishing trips; there is nothing in the record to support the inference that the fishing trips involved a "personal" relationship; and there is no other evidence of any kind that a "personal" relationship existed.

c. Board's erroneous statement: "Byrd admitted that he was not offended or outraged by the remark and that he did not regard it as a personal affront." [R. 66.]

Actuality: Byrd made no such admission. To the contrary, he testified that he was mad enough to have fired Reese on the spot, if he had known that he had had the authority to do so. [T. 556:7-16; 557:9-18; 559:3-14.]

d. Board's erroneous statement. "It also appears from the evidence that Reese was subjected to disparate treatment." [R. 66.]

Actuality: Not so; no other employee told Petitioner to "shove it up their butt" or "stick it up their ass."

e. Board's erroneous statement: "Respondent [Petitioner] offers no reason why the harshest penalty was imposed on Reese when the personnel manual quoted in relevant part by the Trial Examiner provided for punishment of lesser magnitude." [R. 67.]

Actuality: This statement by the Board is in error on two counts: (1) Lux, the supervisor who made the actual decision to discharge Reese [T. 292:15-18; 441:8-442:16; 480:17-481:6], in response to questions by the Trial Examiner, fully explained why he elected to discharge Reese rather than to invoke lesser discipline [T. 504:14-506:2], and (2) the personnel manual, quoted by the Trial Examiner, did not "provide" for lesser penalty, but for alternative penalties, *including* immediate discharge "depending on the seriousness of the offense in the judgment of management." [R. 39:38-40:18.]

f. Board's erroneous statement: "Its [Petitioner's] asserted reason [for Reese's discharge] does not withstand scrutiny in light of the customary usage of such language at the plant, the disparate treatment accorded Reese, the provisions of the personnel manual, the failure to explain the imposition of the harshest punishment, . . ." [R. 68.]

Actuality: Error, as shown above.

g. Board's erroneous statement: "Based upon the above facts, and the conclusions drawn therefrom by the Trial Examiner, as well as Respondent's [Petitioner's] failure to take exceptions thereto and its apparent acceptance of these conclusions,

we do not view Reese's discharge as simply an exercise of an employer's inherent management right to discipline recalcitrant employees." [R. 65-66.]

Actuality: Strange indeed that the Board should base its reversal of the Trial Examiner in part upon Petitioner's "failure" to except to the Trial Examiner's decision, which was 100% in favor of Petitioner and which recommended "that the complaint be dismissed in its entirety." [R. 41:27-28.] For the Board to say that a successful litigant must appeal from a 100% favorable decision or else his "failure" to do so will be a ground for reversal, is a novel theory and a unique foundation for the Board's creation of an otherwise unsupported inference.

Since the Board has relied so heavily upon the foregoing non-existent facts or unfounded inferences in reversing the Trial Examiner, it follows that the Board's decision cannot stand.

Petitioner's motivation, intent or reason for discharging Reese is a question of fact (*NLRB v. Stafford*, 206 F. 2d 19, 22, 23 (8 Cir. 1953)), and the Trial Examiner found as facts that Reese's behavior and attitude toward his supervisor undoubtedly provided cause for discharge [R. 38:40-42] and that he was not discharged for an unlawful reason [R. 41:22-28].

Only the Trial Examiner can fully evaluate credibility (*NLRB v. Park Edge Sheridan Meats, Inc.*, 341 F. 2d 725, 728 (2 Cir. 1965)) and the findings of the Trial Examiner have particular significance where material facts depend on the determination of the credibil-

ity of witnesses. (*Universal Camera Corp. v. NLRB,* 340 U.S. 474, 496, 95 L. ed. 456, 471, 71 S. Ct. 456 (1951).)

The unanimous sworn testimony of Petitioner's witnesses that Reese was discharged solely because of his insubordinate statement cannot be disregarded, as the Board disregarded it [R. 67], merely because of a suspicion that the witnesses may have lied; there must be something more, something more than is found in the record in the present case: there must be impeachment or substantial contradiction, or if circumstances raise doubts, they must be inconsistent with the positive sworn evidence on the exact point. (*Lozano Enterprises v. NLRB,* 357 F. 2d 500, 502 (9 Cir. 1966); *NLRB v. Stafford, supra,* 206 F. 2d at 23.)

Where, as here found by the Trial Examiner, the employer's explanation of the motivation for a discharge is a reasonable one, the onus is upon the Board to establish the falsity of the explanation and the truth of its own interpretation (*NLRB v. United Brass Works, Inc.,* 287 F. 2d 689, 693 (4 Cir. 1961)), but the Board cannot do this, as it has done here, by creating inferences where there is no substantial evidence upon which these may be based. (*NLRB v. Sebastopol Apple Growers Union,* 269 F. 2d 705, 711 (9 Cir. 1959).)

When the Board's erroneous assertions in this case of non-existent facts are, as they should be, purged from consideration, the most that can be said is that there is perhaps a scintilla of evidence in support of the Board's reversal of the Trial Examiner; this of course, does not suffice. (*Herb Stein, Inc. v. NLRB,* 368 F. 2d 556, 558 (6 Cir. 1966).)

Accordingly, since there is no substantial basis in the record for the Board's reversal of the Trial Examiner, and since the Board's reversal of the Trial Examiner is based upon asserted facts which either do not exist or actually are contrary to the record, or upon the creation of inferences that have no support, the Board's reversal of the Trial Examiner should be set aside and the Board's order denied enforcement.

Furthermore, there is another reason to set aside the Board's decision and to deny enforcement.

2. The Board's Finding That Nhoon Reese Was Discriminatorily Discharged Is Based on the Board's Frequent Error of Substituting Its Judgment for That of Management.

Discharge of employees is a normal, lawful legitimate exercise of the prerogative of free management in a free society; an unlawful purpose is not lightly to be inferred, and in the choice between lawful and unlawful motives, the record taken as a whole must present a substantial basis of believable evidence pointing toward the unlawful one. (*Lozano Enterprises v. NLRB, supra,* 357 F. 2d at 503; *NLRB v. Sebastopol Apple Growers Union, supra,* 269 F. 2d at 713; *NLRB v. McGahey,* 233 F. 2d 406, 413 (5 Cir. 1956).)

Even if it be assumed, contrary to fact, that the reasons given by the Board for reversing the Trial Examiner were based upon substantial evidence, it still is error for the Board to reverse the Trial Examiner:

> " 'The Board's error is the frequent one in which the existence of the reasons stated by the employer as the basis for the discharge is evaluated in terms of its reasonableness. If the discharge was ex-

cessively harsh, if lesser forms of discipline would have been adequate, if the discharged employee was more, or just as, capable as the one left to do the job, or the like then, the argument runs, the employer must not actually have been motivated by managerial considerations, and (here a full 180 degree swing is made) the stated reason thus dissipated as pretense, nought remains but antiunion purpose as the explanation. But as we have so often said: management is for management. Neither Board nor Court can second-guess it or give it gentle guidance by over-the-shoulder supervision. Management can discharge for good cause, or bad cause, or no cause at all. It has, as the master of its own business affairs, complete freedom with but one specific, definite qualification: it may not discharge when the real motivating purpose is to do that which Section 8(a)(3) forbids. . . .'"

Lozano Enterprises v. NLRB, 357 F. 2d 500, 503 (9 Cir. 1966);

NLRB v. Sebastopol Apple Growers Union, 269 F. 2d 705, 713 (9 Cir. 1959);

Fort Smith Broadcasting Company v. NLRB, 341 F. 2d 874, 879 (8 Cir. 1965);

Steel Industries, Incorporated v. NLRB, 325 F. 2d 173, 177 (7 Cir. 1963);

Portable Electric Tools, Inc. v. NLRB, 309 F. 2d 423, 426 (7 Cir. 1962);

Schwob Manufacturing Co. v. NLRB, 297 F. 2d 864, 870 (5 Cir. 1962);

NLRB v. McGahey, 233 F. 2d 406, 412-413 (5 Cir. 1956).

Conclusion.

The National Labor Relations Act, as amended, pro-ides that no order of the Board shall require the rein-tatement of any individual, or the payment to him of ny back pay, if he was discharged for cause. (29 J.S.C.A. §160(c).)

Here, the Trial Examiner specifically found that Reese was discharged for cause. [R. 38:40-42.]

Here, the Board reversed the Trial Examiner based n non-existent facts and unsupported inferences, cou-led with the "frequent error" specifically condemned y the Fifth, Seventh, Eighth and Ninth Circuits.

For these reasons, the Board's decision and order hould be set aside, and enforcement denied.

Respectfully submitted,

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Certificate.

I certify that, in connection with the preparation of his brief, I have examined Rules 18, 19 and 39 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

FRANK SIMPSON